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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 583

HARRY R. GRAHAM and THELMA GRAHAM,
Petitioners,

v.

W. RANDOLPH HODGES, H. V. GIBSON and EDWARD G. LITTLE, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPPOSITION TO GRANTING PETITION FOR WRIT OF CERTIORARI FOR FAILURE TO APPLY WITHIN PRESCRIBED TIME

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 347 F.2d 340 (5th Cir. 1967).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Is it a deprivation of a person's liberty and property without due process of law under the Fourteenth Amendment to the United States Constitution for agents of a state of the United States to arrest one of its citizens on the high seas and confiscate his property where said agent has the lawful authority to regulate the citizen's activities under the state law where the state has a legitimate interest in the activities regulated and where there is no conflict with acts of Congress?

STATUTES INVOLVED

42 U.S.C., Section 1983, set forth in the petition as Appendix A; Section 370.02(5), Florida Statutes 1963, printed as Appendix A, *infra;* Section 370.14(1), Florida Statutes 1963, printed as Appendix B, *infra.*

STATEMENT

On August 4, 1965, the petitioners filed a complaint in the United States District Court for the Southern District of Florida and sued the respondents under 42 U.S.C., Section 1983, for the alleged deprivation of certain federally guaranteed civil rights (R 1-10). The complaint was dismissed by the District Court for failure to state a cause of action (R 16). The peti-

tioners appealed and the United States Court of Appeals for the Fifth Circuit affirmed the order of the District Court. *Graham* v. *Hodges*, 374 F.2d 340 (5th Cir. 1967).

As stated in the petition at pages 3-4, the petitioners' complaint did substantially make the allegations that the agents of the respondents arrested the petitioners between the dates of July 20, 1963, through July 23, 1963, and July 21, 1964, through July 26, 1964, confiscated certain articles of personalty, caused the petitioners to post appearance bonds and allegedly caused them personal hardship.

Although the petition brushes lightly over the reasons for the arrests, the record and the complaint clearly show that the alleged actions of the respondents occurred between the dates of July 20, 1963, through July 23, 1963, and from July 21, 1964, through July 26, 1964, for the principal reason that the petitioners were in violation of Section 370.14(1), Florida Statutes 1963, which prohibits the taking or possession of salt water crawfish regardless of where taken between March 31 and August 1 of each year.

ARGUMENT

I

THE DECISION BELOW IS CLEARLY CORRECT

The petitioners seek comfort in the Florida cases of *Gay* v. *State*, Fla. 1941, 3 So.2d 514, and *Mounier* v. *State*, Fla. 1965, 178 So.2d 714, on the premise that the cases hold that an arrest made by a state conservation agent outside of the territorial

limits of Florida on the high seas was unlawful under Florida law.

The decision of the United States Court of Appeals for the Fifth Circuit in the instant case adequately distinguished the *Mounier* case by holding that *Mounier* did not stand for the proposition that conservation officers have no jurisdiction whatsoever beyond the three-mile offshore boundary fixed by the state's constitution, in its decision at page 338, as follows:

". . . But Mounier does not stand for that proposition. The case was decided on the very narrow ground that the spearfishing regulation violated by Mounier by its terms applied only to a specified area in Monroe County, and the State failed to prove that the alleged offense occurred within that specified area.[2] In the course of the opinion, the court said:

" 'Before proceeding to a further discussion of the question, we deem it pertinent to point out that the statute above quoted makes spearfishing unlawful in an area "in Monroe county known as the Upper Keys." The language following the semicolon to the effect that said area shall include all waters under the jurisdiction of the State Board of Conservation, etc. must be construed as relating only to that area lying within Monroe County. *Whether the State Board of Conservation or the State of Florida through any other agency has jurisdiction over the waters or over the conduct of these defendants where the offense was committed or beyond that into the open ocean is a question not presented*

2. "Two other cases relied upon by appellant in a supplemental brief to support this proposition, United States v. Sands (S.D. Fla., No. 64-401-Cr-Cf, Jan 11, 1965), and Gay v. Florida, 147 Fla. 690, 3 So.2d. 514 (Fla. 1941), are similarly inapposite."

here and one on which we do not pass.' Id. at 715-716. (Emphasis added.) (Footnote omitted.)"

The court below then cited the statutory authority of the state of Florida to regulate the operation of all fishermen and vessels of this state engaged in the taking of such fishery resources within or without the boundaries of such state waters as found in Section 370.02(5), Florida Statutes.

On the basis of the foregoing, the United States Court of Appeals stated that if a state can properly regulate the activities of its citizens and extend the jurisdiction of its conservation officials to activities such as those which the petitioners claim to have been engaged in here under the Federal Constitution, the dismissal of the petitioners' complaint must be affirmed.

For this reason the United States Court of Appeals stated that this was the critical question and the critical question has been authoritatively answered and answered in the affirmative in *Skiriotes* vs. *State of Florida*, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941), where the issue was whether a Florida statute forbidding the use of diving equipment in the taking of commercial sponges had been unconstitutionally applied to convict the appellant who claimed immunity from Florida regulation by reason of the fact that he was operating outside the territorial limits of the state. Florida contended that her boundaries did in fact encompass the territory in question. The Supreme Court found it unnecessary to decide this question. Instead it said:

"Appellant's attack thus centers in the contention that the State has transcended its power simply because the statute has been applied to his operations inimical to its interests outside the territorial waters of Florida. The State denies

this, pointing to its boundaries as defined by the state constitution of 1868, which the State insists had the approval of Congress and in which there has been acquiescence over a long period.

"* * *

"[W]e do not find it necessary to resolve the contentions as to the interpretation and effect of the Act of Congress of 1868. *Even if it were assumed that the locus of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place.* No question as to the authority of the United States over these waters, or over the sponge fishery, is here involved. No right of a citizen of any other State is here asserted. The question is solely between appellant and his own State. * * *

"If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress." Id. at 75-77, 61 S.Ct. at 929. (Emphasis added.)

The lower court then went on to find that Florida had a legitimate interest in controlling the activities which it sought to regulate in this case.

Your respondents submit that the *Skiriotes* case is the controlling case in this matter and the decision below is clearly correct.

II

THERE IS NO CONFLICT OF DECISION

Your respondents submit that since the *Skiriotes* case is the controlling law in the case at bar and the rule as applied in *Skiriotes* has not been overturned by this Court or any other court, there is no conflict of decisions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

ROBERT A. CHASTAIN
Assistant Attorney General

Counsel for Respondents

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Respondents respectfully represent to the Court as follows:

1. The above entitled cause was argued and submitted on February 20, 1967, and an opinion was rendered and judgment entered on March 22, 1967, by the United States Court of Appeals for the Fifth Circuit. Petition for rehearing was denied on May 8, 1967.

2. On August 8, 1967, the ninety-second day since the entry of the order by the Court of Appeals denying the petition for

rehearing, the petitioners applied for an extension of time in which to file petition for writ of certiorari to this Court and the period for applying for a writ of certiorari has not been extended by a Justice of this Court [U.S.C., Title 28, Section 2101(c) and Rule 38 of this Court].

THEREFORE, it appears that the petitioners' application for a writ of certiorari is out of time and should be denied.

Respectfully submitted,

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Attorney General

ROBERT A. CHASTAIN
Assistant Attorney General

The Capitol
Tallahassee, Florida

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief for respondents in opposition to granting petition for writ of certiorari and opposition to granting petition for writ of certiorari for failure to apply within prescribed time was served by U.S. mail on Henry R. Carr, Esq., 1440 Northwest 14th Avenue, Miami, Florida, William B. Seidel, Esq., 200 S.E. 6th Street, Fort Lauderdale, Florida, and Phillip A. Hubbart, Esq., 1351 Northwest 12th Street, Miami, Florida, Counsel for Petitioners, this ..... day of October, 1967.

Robert A. Chastain
Of Counsel for Respondents

APPENDICES

APPENDIX A
(Florida Statutes, 1963)

370.02 *Board of Conservation.—*

* * *

(5) DIVISION OF SALT WATER FISHERIES; POWERS AND DUTIES.—

(a) It shall be the duty of the division of salt water fisheries to preserve, manage, and protect the marine, crustacean, shell and anadromous fishery resources of the state in the waters thereof; to regulate the operations of all fishermen and vessels of this state engaged in the taking of such fishery resources within or without the boundaries of such state waters, to issue licenses or provide for the issuance of licenses, prescribed by the legislature, for taking of the products of any or all such fisheries and the processing at sea or on shore within this state; to secure and maintain statistical records of the catch of each such species by various gear, by areas and by other appropriate classifications; to conduct scientific, economic and other studies and research, and to enter into contracts for such studies and research, all of which duties and operations shall be directed to the broad objective of managing such fisheries in the interest of all people of the state, to the end that they shall produce the maximum sustained yield consistent with the preservation and protection of the breeding stock.

(b) The division of salt water fisheries shall administer, coordinate, and enforce the provisions of §§370.03-370.17 and chapter 371.

(c) The board may employ a director of the division of salt water fisheries. The director shall possess such qualifications

as the board may prescribe, and he shall serve at the pleasure of the board. The director shall act as agent for the board in the employment of all necessary administrative and other personnel, including conservation agents and officers as may be necessary to carry out the work, duties and responsibilities of this division.

APPENDIX B
(Florida Statutes, 1963)

370.14 Crawfish; regulation.—

(1) CLOSED SEASON; PENALTY.—No salt water crawfish may be taken from waters of this state for commercial purposes and no person may have same in his possession, regardless of where taken, between March 31 and August 1 each year. Provided, however, that it is unlawful for any person at any time to take or have in his possession, regardless of where taken, any salt water crawfish with a shell measurement of tail of less than six inches for any purpose whatsoever. Any person violating this section shall, upon conviction, be punished by a fine not exceeding $250.00 or by imprisonment not exceeding 6 months.

(2) CARRIERS; PENALTY.—No common carrier or employee of said carrier may carry or knowingly receive for carriage or permit the carriage of any crawfish, regardless of where taken, between March 31 and August 1, of each year, except crawfish lawfully imported from a foreign country for reshipment outside of the territorial limits of the state; but in no case will such shipment be permitted to pass through the territorial limits of the state unless accompanied by certified invoice and same must be shipped from the port of entry. Any person violating this section shall, upon conviction, be punished by a fine not exceeding $250.00 or by imprisonment not exceeding 6 months.